Low Tien Sang & Sons Holding Sdn Bhd & Ors v How Kem Chin & Ors

HIGH COURT (KUALA LUMPUR) — COMPANY WINDING-UP NO D1-28-485 OF 1997
MOHD GHAZALI J
25 OCTOBER 1999

Companies and Corporations — *Winding up — Petition — Oppression — Allegation of directors' breach of fiduciary duties — Board of directors allowed low rental of property to third party — Increased remuneration for directors despite losses — Managing director utilized fund for own use and benefit — Whether oppression within s 181(1)(a) of Companies Act 1965*

The petitioners were the minority shareholders of the sixth respondent, Nova Industrial Enterprise Sdn Bhd ('Nova'). The petitioners alleged that the affairs of the company were being conducted in an oppressive manner and hence pursuant to s 181 of the Companies Act 1965 sought for an order that Nova be wound up. The main areas of oppression as forwarded by the petitioners were: (i) the resolution of the board to let out a portion of Lot 893 to Syarikat Common Brick Sdn Bhd ('SCB') at a low rental was an oppression on the interest of the minority shareholders; (ii) the first to the fifth respondents who were in control of Nova had breach their fiduciary duty, viz they had acted in a manner detrimental to the interest of Nova; (iii) Nova had suffered loss for the accounting year ended 31 July 1998 and despite that Nova increased the remuneration of its directors to the detriment of its shareholders; and (iv) the first respondent, as managing director, utilized Nova's fund for his own use and benefit.

Held, dismissing the petition:

(1) The minutes of the board meeting did not at all show that the directors of the minority shareholders objected to the proposal to rent that part of Lot 893 to SCB. It was a decision of the majority and the decision was in line with art 90 of Nova's articles of association. Even if the minutes did show that there were objections or protests from the directors of the minority shareholders, that could not be oppression (see 344H–I).

(2) How much rent is to be charged is a question of policy which would have to be decided by the board. The majority of the board at the outset have decided that the rental was fair. It is not the function of the court in these proceeding to enquire and make a finding as to whether the rental charged is too low or is below market value seeing that a majority of the board has made a policy decision on the matter (see p 345F–H).

(3) The evidence seemed to suggest that Nova had sanctioned payment of salaries, directors' fees, bonus and allowances. Article 76 of Nova's articles of association clearly allowed

remuneration to be paid. Directors of the minority shareholders were also paid directors' fee and 'commission fee' in accordance with their shareholding. That being the practice in Nova, it is not the function of the court hearing this petition to enquire as to whether such payments were improper or whether they were too excessive under the circumstances. Unless there was evidence to show that these payments had not been sanctioned by Nova, it is a non-issue as far as these proceedings were concerned (see p 349G–I).

(4) The petitioners had failed to prove that the first to the fifth respondents had acted in disregard to their interest or that the affairs of Nova had been conducted in a manner oppressive to the petitioners. The oppression that the petitioners were complaining about seemed to relate more towards the first to the fifth respondents rather than towards the affairs of Nova itself. On the whole, the circumstances and matters complained of by the petitioners did not at all denote that there was oppression within the meaning of s 181(1)(a) of the Companies Act 1965 (see p 349G–I).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen merupakan pemegang saham minoriti kepada responden keenam, Nova Industrial Enterprise Sdn Bhd ('Nova'). Pempetisyen-pempetisyen mendakwa bahawa urusan syarikat dikendalikan dengan cara yang menindas dan justeru itu menurut s 181 Akta Syarikat 1965 memohon untuk satu perintah agar Nova digulungkan. Bahagian-bahagian utama penindasan yang dikemukakan oleh pempetisyen-pempetisyen adalah: (i) resolusi lembaga untuk menyewakan sebahagian daripada Lot 893 kepada Syarikat Common Brick Sdn Bhd ('SCB') pada kadar sewa yang rendah merupakan satu penindasan terhadap kepentingan pemegang-pemegang saham minoriti; (ii) responden-responden pertama sehingga kelima yang menguasai Nova telah melanggari kewajipan fidusiari mereka, yakni mereka telah bertindak dengan cara yang telah menjejaskan Nova; (iii) Nova telah mengalami kerugian pada tahun perakaunan yang berakhir pada 31 Julai 1998 dan meskipun begitu Nova telah menaikkan gaji pengarah-pengarahnya sehingga menjejaskan pemegang-pemegang sahamnya; dan (iv) responden pertama, seorang pengarah urusan, telah menggunakan wang Nova untuk kegunaan dan manfaat beliau sendiri.

Diputuskan, menolak petisyen tersebut:

(1) Minit mesyuarat lembaga tidak langsung menunjukkan bahawa pengarah pemegang saham minoriti telah membantah kepada cadangan untuk menyewa sebahagian daripada Lot 893 kepada SCB. Ia merupakan keputusan majoriti dan keputusan tersebut adalah selaras dengan fasal 90 kepada artikel persatuan Nova. Walaupun minit tersebut menunjukkan bantahan atau protes

daripada pengarah pemegang saham minoriti, itu tidak mungkin merupakan satu penindasan (lihat ms 344H–I). A

(2) Banyak mana sewa yang harus dikenakan adalah satu persoalan polisi yang sepatutnya diputuskan oleh pihak lembaga. Pihak majoriti lembaga pada permulaanya telah memutuskan bahawa sewaan tersebut adalah adil. Mahkamah di dalam prosiding ini tidak berfungsi untuk bertanya dan membuat penemuan sama ada sewaan yang dikenakan adalah terlampau rendah atau adalah di bawah nilai pasaran memandangkan pihak majoriti lembaga telah membuat keputusan polisi berhubung perkara tersebut (lihat ms 345F–H). B

(3) Adalah kelihatan seperti keterangan tersebut mencadangkan bahawa Nova telah membenarkan pembayaran gaji, yuran pengarah, bonus dan elaun. Fasal 76 kepada artikel persatuan dengan jelas membenarkan gaji dibayar. Pengarah kepada pemegang saham minoriti juga dibayar yuran pengarah dan 'yuran komisen' bersesuaian dengan pegangan saham mereka. Dengan fungsi yang diamalkan oleh Nova, bukanlah fungsi mahkamah yang mendengar petisyen ini untuk menanyakan sama ada pembayaran tersebut adalah tidak betul ataupun sama ada ia adalah berlebihan di dalam keadaan tersebut. Kecuali terdapat keterangan yang menunjukkan bahawa pembayaran tersebut tidak dibenarkan oleh Nova, ia bukanlah satu isu sejauh mana prosiding ini berkaitan (lihat ms 349G–I). C D E

(4) Pempetisyen-pempetisyen telah gagal untuk membuktikan bahawa responden-responden pertama hingga kelima telah bertindak dengan tidak mempedulikan kepentingan mereka atau bahawa urusan-urusan mengenai Nova telah dikendalikan dengan cara yang menindas kepada pempetisyen-pempetisyen tersebut. Penindasan yang telah diadukan oleh pempetisyen-pempetisyen kelihatan seperti lebih berkaitan dengan responden-responden pertama sehingga kelima daripada terhadap urusan-urusan mengenai Nova sendiri. Pada keseluruhannya, keadaan-keadaan dan perkara-perkara yang diadukan oleh pempetisyen-pempetisyen tidak langsung menandakan bahawa terdapat penindasan di dalam maksud s 181(1)(a) Akta Syarikat 1965 (lihat ms 351G–I).] F G

Notes H

For cases for petition for winding up generally, see 3 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 809–840.

Cases referred to I

Elder & Ors v Elder & Watson Ltd (1952) S 49 (refd)
George Newman & Co, Re [1895] 1 Ch 674 (refd)
Harmer Ltd, Re [1959] 1 WLR 62 (refd)

Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors [1994] 1 MLJ 520 (refd)

Legislation referred to

Companies Act 1965 ss 131, 132(1), 181, 181(1)(a), 181(2)
English Companies Act 1948 s 210

Lim Chong Leong (*Hairul Azam bin Hambali* with him) (*Azam Lim & Pang*) for the petitioners.

Khor Chai Koan (*Lee Han Meng* with him) (*Khor, Anuar & Khong*) for the respondents.

Mohd Ghazali J:

In this action, the petitioners who are the minority shareholders of the sixth respondent, a company named Nova Industrial Enterprise Sdn Bhd ('Nova'), complain that the affairs of the company are being conducted in an oppressive manner and hence, pursuant to s 181 of the Companies Act 1965 ('the Act'), seek the following reliefs, namely:

(a) that Nova be wound up;

(b) that the official receiver be appointed liquidator;

(c) or in the alternative, that such further or other orders or directions be made or given under s 181(2) of the Act with a view to bringing to an end or remedying the matters complained of;

(d) the costs of and occasioned by this petition be provided for; and

(e) further or other relief.

The background to their complaint is as follows:

Nova was incorporated on 16 January 1974 under the Act with the name of Soon Chin Enterprise Sdn Bhd. It changed its name to the present name on 25 July 1974. Its nominal capital is RM1,000,000 divided into 10,000 shares of RM100 each and its paid-up capital is RM579,000. Amongst its foremost objects is to carry on the business of manufacturing bricks. Its present shareholding is as follows:

	Shareholder	No. of shares @ RM100
1	Low Tien Sang & Sons Holdings Sdn Bhd (first petitioner)	800
2	Low Thian Hoo @ Lin Thian Hoe (second petitioner)	250
3	Ang Kim Hock Realty Sdn Bhd (third petitioner)	750
4	How Kem Chin (first respondent)	1,300
5	Lim Kim Hui (f) (second respondent)	525
6	How Ying Chong (third respondent)	450
7	How Eng Hing (fourth respondent)	440
8	Shin Tang Yoong @ Shin Chun Shoon (fifth respondent)	450
9	Hon Wei Sun (f)	100
10	Daliwa Steel Manufacturing Sdn Bhd	175
11	Kek Siew Kim @ Keh Gein Hoe(f)	500
12	Lim Boo Han	50
		5,790

The directors of Nova includes the first to the fifth respondents. From my calculations, the petitioners hold 31.1% of the paid-up share capital of Nova whereas the first to the fifth respondents hold 54.66%. The following are not disputed, namely:

(i) that Nova is the owner of the following pieces of land, namely:
  (a) HS(D) 518 No PT 883 Mukim of Damansara ('Lot 883');
  (b) Lot 893 EMR No 2659 Mukim of Damansara ('Lot 893');
  (c) QT(M) L Lot 884 Mukim of Damansara ('Lot 884');

(ii) that Lot 883 has not been transferred to Nova and that the first respondent is its registered owner holding on trust for Nova;

(iii) that Nova's premises are currently situated on Lot 883 and Lot 884.

The petitioners' complaint consist of the following:

(1) That at the 34th board meeting of Nova held on 22 September 1994, it was resolved that Nova let out approximately 50% of the land area of Lot 893 to a company named Syarikat Common Brick Sdn Bhd ('SCB') at a monthly rental of RM500; Lot 893 measures 2.906 acres;

(2) SCB is also involved in the business of manufacturing and supplying of bricks and the first to the fifth respondents are its directors and shareholders;

(3) The aforesaid decision of the board is an oppression on the interest of the minority shareholders for the following reasons:
  (a) the other half portion of Lot 893 was let out to a tenant for the sum of RM3,648 whereas SCB was allowed to pay only RM500 per month to occupy almost half of Lot 893 although the board was informed that the portion of the area intended to be let out was only 20,000 square feet;
  (b) the market value of Lot 893 in 1991 was RM1,000,000 and almost half of Lot 893 has been let out for industrial use to SCB;
  (c) Majlis Daerah Petaling's valuation of rental income for Lot 893 is at RM156,000 pa and based on this assessment, the rental of a half portion of Lot 893 should be RM6,500 per month;
  (d) the board did not make any attempt to look for a tenant on that particular half portion of Lot 893 and they did not advertise nor attempt to obtain a better rental;
  (e) the second and third respondents who attended the 34th board meeting did not disclose their interest in SCB when the matter was discussed;
  (f) the first, second, third and fifth respondents are in breach of their fiduciary duty which they owe to Nova by attending the meeting and voting in favour of that resolution which benefit them as directors of SCB;
  (g) the first to the fifth respondents as directors and the said Hon Wei Sun (a shareholder of Nova but not a party to these

proceedings) have by their position in Nova and without regard to the petitioners' rights and wishes caused Nova to rent part of Lot 893 to SCB at a rent below market value;

(4) The first to the fifth respondents are seriously in breach of their fiduciary duty, viz, they are in control of Nova but have acted in a manner detrimental to the interest of Nova which amounts to an oppression to the petitioners for the following reasons:

(a) SCB is carrying on the business of brick manufacturing producing the same or substantively the same product as Nova as can be seen from the minutes of Nova's 35th board meeting held on 12 January 1995;

(b) Nova and SCB have five common directors, ie the first to the fifth respondents;

(c) the first to the fifth respondents control the board of directors of Nova by virtue of their effective control of Daliwa Steel Manufacturing Sdn Bhd ('Daliwa') which hold a substantial portion of shares in Nova;

(d) up to date the second, third and fourth respondents have not disclose their interest in SCB;

(e) the first to the fifth respondents have by their actions caused Nova to act to their benefit and third parties at the expense of and to the detriment of Nova and caused Nova's business to decline and lose money;

(5) Nova has suffered a loss of RM71,977 for the accounting year ended 31 July 1996 and despite that Nova increased the remuneration of its directors as follows:

	Increase of salary	Bonus	Lodging allowances
first respondent	RM200	RM7,600	RM7,600
third respondent	RM100	RM2,200	RM2,200
fourth respondent	RM100	RM 600	RM 600
fifth respondent	RM300	RM4,800	RM4,800

The first, third, fourth and fifth respondents have as directors caused Nova to pay these salaries, bonus and allowances for their personal benefit and to the detriment of its shareholders;

(6) The first respondent, as managing director, utilised Nova's funds for his own use and benefit to the detriment of Nova, namely:

(a) the sum of RM5,000 to refurbish the interior of the third respondent's motor-car bearing registration No WDK6633;

(b) the sum of RM4,958 for a trip to South Africa sometime between 20 April 1996 and 30 April 1996;

(c) the sum of RM1,908 for a trip to China between 28 March 1997 and April 1997;

Nova has no business connections of any sort whatsoever in South Africa nor China and the trips were purely leisure in nature;

(7) Nova made profits in the previous years and for the financial year ended 31 July 1995, some of these profits were distributed to the shareholders, namely:

(a) the first petitioner was allocated payment of RM4,146;

(b) the second petitioner was allocated payment of RM1,296;

(c) the third petitioner was allocated payment of RM3,885;

however, despite repeated demands, the above sums have yet to be paid to the petitioners.

Under the above circumstances the petitioners aver:

(i) that the first to the fifth respondents as directors have breached their fiduciary duty to Nova;

(ii) the affairs of Nova are being conducted or the powers of those directors are being exercised in a manner oppressive or in disregard of the petitioners' interest;

(iii) those directors have acted in the affairs of Nova for their own interest rather than in the interest of the members as a whole or in an unjust or unfair manner;

and that in all circumstances of the case, this is a fit and proper case for the court to intervene under the provisions of s 181 of the Act and grant the reliefs prayed for.

The issue before me is, of course, whether the petitioners have brought themselves within the scope of s 181 of the Act, which read:

(1) Any member or a holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such orders as it thinks fit and without prejudice to the generality of the foregoing the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

A (b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a B reduction accordingly of the company's capital;

(e) provide that the company be wound up.

From the petition and the evidence adduced before me, I find that the petitioners have confined themselves only to the ground under s 181(1)(a) of the Act and that being the position, they thus have to show that the affairs C of the company are being conducted in a manner oppressive to one or more of the members, including themselves. For the petitioners to succeed in their application for the said reliefs, they must show the following:

(1) that it is the affairs of Nova itself which are conducted in an oppressive manner; and D

(2) that Nova has oppressed the minority shareholders including themselves.

The word 'oppressive' was defined in *Re Harmer Ltd* [1959] 1 WLR 62 to mean 'burdensome, harsh and wrongful'. In *Elder & Ors v Elder & Watson* E *Ltd* (1952) S 49, with regard to the phrase 'oppressive to some part of the members' found in s 210 of the English Companies Act 1948 (which is the equivalent of s 181 of our Act), Lord President (Cooper) said (at p 113):

> ... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair F dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. This, broadly speaking, was the class of case which the draftsman of s 210 evidently had in mind, and the question is whether the petitioners have brought themselves within the scope of the section.

At p 116 of the same case, Lord Keith said:

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> It is not lack of confidence between shareholders per se that brings s 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as shareholder;

H and at the same page said:

> The company's affairs must be conducted in a manner oppressive to some part of the members and that connotes to my mind an abuse of power by some person or persons controlling the company and resulting in injury to the rights of some part of its members.

I In the instant case, from my reading, the following are the main areas of oppression as forwarded by the petitioners who are the minority shareholders of Nova, namely:

(i) the resolution of the board to let out that portion of Lot 893 to SCB at a low rental is an oppression on the interest of the minority shareholders;

(ii) the first to the fifth respondents who are in control of Nova have breached their fiduciary duty, viz, they have acted in a manner detrimental to the interest of Nova which amounts to an oppression to the petitioners;

(iii) Nova has suffered a loss for the accounting year ended 31 July 1998 and despite that, Nova increased the remuneration of its directors to the detriment of its shareholders;

(iv) the first respondent, as managing director, utilized Nova's funds for his own use and benefit.

(1) SCB's tenancy on Lot 893:

The matter of SCB wanting to rent a part of Lot 893 was discussed at the 34th board meeting of Nova held on 22 September 1994. The meeting was chaired by Low Kim Soi @ Low Tien Sang (SP2) who is a member of the board of Nova and also a director of the first petitioner. The other board members who were present included the first, second, third and fifth respondents and one Lim Boon Han (SP3).

The minutes of the 34th board meeting showed that it was made known to the board that SCB offered to rent from Nova part of Lot 893 measuring 20,000 square feet. That part of Lot 893 was vacant at that time. The board took up the offer and agreed to rent it to SCB for a period of three years with an option to renew for another three years. It was agreed at that meeting that the rental period, at RM500 per month, is to commence on 1 January 1995 and to end on 31 December 1997. It was also agreed that SCB be offered a grace period of three months from October 1994 to December 1994 for levelling and general earth works and that the entire cost for such works is to be borne by SCB. The minutes, inter alia, read:

> In conclusion the board of directors agreed to rent the said land to Syarikat Common Brick Sdn Bhd, on the said guidelines and to make the said tenancy agreement with them. It was further agreed that Mr Shin Tang Yoong @ Shin Chun Shoon (the fifth respondent) be appointed to deal with the said matter and to sign the said tenancy agreement on behalf of the Company.
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> Mr Shin Tang Yoong @ Shin Chun Shoon (the fifth respondent) explained in the meeting that the said tenant's nature of business would totally have no business conflicts with that of the company.

The minutes also show the following:

> Disclosure of director's interests
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> Two of the Company's Directors namely, Mr How Kem Chin (the first respondent) and Mr Shin Tang Yoong @ Shin Chun Shoon (the fifth respondent) declared in the meeting that they are directors and shareholders of Nova Industrial Enterprise Sdn Bhd (the sixth respondent), and Syarikat

A Common Brick Sdn Bhd. They also wished to be covered under the provision of article No 84 of the company's articles of association. This was agreed.

The 35th board meeting of Nova held on 12 January 1995 was chaired by SP2 and was attended by the first, second, third and fifth respondents and also SP3. The minutes relating to SCB read:

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6.03 Rental of vacant land to Syarikat Common Brick Sdn Bhd

The chairman was concerned on the rental of the Company's vacant land to Syarikat Common Brick Sdn Bhd (SCBSB). Firstly he reported that the company secretary had omitted the following minutes on this subject in the last meeting:

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'The Chairman expressed that why not the business of SCBSB be done by the Company itself instead of they (SCBSB) doing it in the same business premises of the Company by way of renting out the land. Furthermore a group of directors inclusive of the Managing Director of the Company are directors in this new company. His believe is that the Company would benefit better if the said business is operated by the

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Company itself.'

(Note: The said omission of minutes was taken as amendments to the last meeting minutes. This was agreed.)

Mr Shin Tang Yoong @ Shin Chun Shoon (the fifth respondent) stated that since the land was vacant, it would be better for renting out for some

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income. Furthermore he reminded that the land was vacant for sixteen years and also explained that the rental rate and the terms and conditions of the tenant has been clearly stated in the last meeting minutes.

In reply to the Chairman's question, the Managing Director (the first respondent) explained that the rental of the land is RM500 per month which is due to the fact the land need to be done earthworks and levelling which will

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cost about RM10,000 or more. He further added that so far no one was interested to rent the land and that the land was vacant for sixteen years. He further clarified that the matter has now passed and that the land's cost would be between 0-05 sen to 0-07 sen per sq ft after the completion of the earthworks and levelling.

G In his evidence in relation to the tenancy, SP2, who chaired the 34th and 35th board meetings stated that SCB started its operations in 1995. For the first three years it paid a rent of RM500 per month and from 1998, the rent was RM750 per month. He claimed that he objected to the rental but not the tenancy but his objection was not recorded in the minutes of the 34th board meeting. He was of the view that the rental was too low and should

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be in the region of RM1,000 to RM2,000 per month. Furthermore the area rented measured 20,000 square feet but SCB subsequently utilized an area beyond that 20,000 square feet amounting to about 50% of Lot 893.

In his evidence SP2 admitted he knew that the first to the fifth respondents had an interest in SCB. He also admitted that the tenancy

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agreement signed between SCB and Nova was approved by the board notwithstanding his objection. He however stressed that ever since SCB commence its business operations, Nova experienced a business downturn.

In his evidence SP4, a private valuer, state that he valued the three lots owned by Nova on 12 February 1999 and was of the view that the value of Lot 893 as that date is RM2.5m and its ground rent should be in the region of RM12,000 per month. SP5, a land surveyor, who surveyed Lot 893 on 23 March 1999, confirmed that it measured 2.906 acres. He stated that effectively SCB occupied an area of about 31,388 square feet but agreed that SCB's brick factory occupies an area of about 100 feet by 200 feet, ie 20,000 square feet.

In his evidence, the first respondent (SD2) who is also a director of Daliwa Steel besides Nova and SCB and who has worked with Nova for 22 years, insisted that SCB is only renting an area measuring 20,000 square feet. He stressed that prior to the tenancy, that part of Lot 893 was vacant for 16 years. There was an old mining pool on the land and the part rented needed to be filled. Consequently SCB paid for the land filling and paid one-quarter of the yearly assessment imposed by the local authority amounting to RM1,121.25 per year. The land filling itself cost SCB RM16,400. The first respondent stressed that the tenancy agreement was approved at the 34th board meeting of Nova.

In reply to the various allegations on oppression, the first respondent explained that at the outset, he invited SP2 to participate in SCB but the latter lacked confidence in the product that SCB was going to manufacture, namely, bake-free bricks, which was then a new product in Malaysia. SP2 and the other petitioners declined the offer as they thought the new product are sand-bricks. In his evidence SP2 had admitted that Nova manufacture fire-bricks or baked-bricks whereas SCB manufacture bake-free bricks or non-baked bricks. SP2 also admitted that non-baked bricks is considered to be a new product in Malaysia.

I cannot see how this decision of the board at its 34th meeting can be said to an oppression on the interest of the minority shareholders. It was a decision of the majority and that decision was in line with art 90 of Nova's articles of association which read:

> The Directors may meet together for the despatch of business adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Unless otherwise determined, two shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote.

The 34th board meeting was chaired by SP2. He was also the chairman when the same matter was raised again in the 3fifth board meeting. The minutes of both meetings do not at all show that the directors of the minority shareholders objected to the proposal to rent that part of Lot 893 to SCB. Even if the minutes did show that there were objections or protests from the directors of the minority shareholders, that, to me, cannot be oppression. In his book entitled *The Law of Company Liquidation* (3rd Ed), JO' Donovan was of the view (at pp 141–142) that relief under s 320 of the Australian Companies Act (which is the equivalent of s 181 of our Act) is

A available to any member of a company who complains that its affairs are being conducted in a manner which is oppressive to one or more of the members, including himself and that the second requirement is that it must be the affairs of the company itself which are conducted in an oppressive manner. He went on to say (at pp 143–144):

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> It has frequently been stressed that s 320 is not intended to provide minority shareholders with a means of stultifying the voting power of the majority: ...
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> > 'The mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which the other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority. (*Re Harmer Ltd* (1959) 1 WLR 62 at p 87 per Romer LJ).'
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> Hence, it does not constitute oppression for those in control to insist upon the adoption of a policy on a matter of business on which there may be legitimate differences of opinion, nor is it oppression if an existing state of inequality results from the provisions of the constitution of the company and not from any action on the part of those in control.

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On the same area of complaint, the petitioners have alleged that although the tenancy agreement is for an area of 20,000 square feet, SCB has utilized an area amounting to approximately 50% of Lot 893, ie about 1.453 acres. In his evidence, SP4, who conducted a survey on Lot 893, state that effectively SCB occupies an area of about 31,388 square feet but agreed that SCB's brick factory occupies an area measuring 20,000 square feet. If at all SCB has encroached beyond the area that was rented to them, the directors of the minority shareholders are at liberty to raise this in the board meetings of Nova. There is nothing to show they have done so and further, the tenancy has even been renewed for another period of three years at the monthly rent of RM750. How much rent is to be charged is a question of policy which would have to be decided by the board. The majority of the board at the outset have decided that the monthly rental of RM500 for the first three years of the tenancy is fair seeing that that part of Lot 893 has been vacant for 16 years and that it need to be filled before it can be utilized. SCB has carried out the land-filling at its own expense and is also paying one-quarter of the assessment charge imposed on the said Lot 893 by the local authority. I do not think it is the function of the court in these proceedings to enquire and make a finding as to whether the rental charged is too low or is below market value seeing that a majority of the board has made a policy decision on the matter.

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(2) Breach of fiduciary duty:

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The evidence adduced at the trial showed SCB was incorporated on 13 September 1994. Its issued and paid-up capital is RM500,000 of RM1 per share. It has seven directors including the first to the fifth respondents. The first to the fifth respondents hold 310,000 shares, ie 62%.

On this area, the petitioners contend SCB is also in the business of manufacturing bricks and hence a direct competitor of Nova. SCB is owned by the majority shareholders of Nova and have five common directors, ie the first to the fifth respondents. Further, SCB is operating next-door to Nova on land owned by Nova and is paying a very low rent for the tenancy. Under the circumstances it is their stand that the first, second, third and fifth respondents as directors of Nova are in breach of their fiduciary duty which they owe to Nova by attending the 34th board meeting and voting in favour of that resolution to rent part of Lot 893 at a rent below market value which benefit them as directors of SCB.

Incidentally evidence was adduced at the trial by the respondents to show that the first petitioner is a substantial shareholder — it owns 90% of the issued share capital — of one Bata Waja Sdn Bhd ('Bata Waja'), which also manufactures the same type of bricks as Nova. It is not disputed that Bata Waja has been operating since 1982 and its factory is located in Kundang, Selangor which the respondents insist is about 40km from Nova's factory and which share the same common marketing area. The petitioners however deny that Bata Waja is a competitor of Nova and insist that the first to the fifth respondents never objected to Bata Waja's business.

What are the fiduciary duties of directors of a company? Section 132(1) of the Companies Act 1965 provides 'A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office'. Generally, directors owe fiduciary duties and certain duties of care to the company. According to *Osborn's Concise Law Dictionary* (7th Ed) the word 'fiduciary' means 'the relationship of one person to another, where the former is bound to exercise rights and powers in good faith for the benefit of the latter; eg as between trustee and beneficary. A court of equity will not allow a person in a fiduciary position (unless expressly so entitled) to make a personal profit or to put himself in a position where his duty and his interest conflict.' According to *Charlesworth and Cain on Company Law* (12th Ed) at p 371:

> The fiduciary duties of directors are:
>
> (1) to exercise their powers for the purposes for which they were conferred and bona fide for the benefit of the company as a whole, ...;
>
> (2) not to put themselves in a position in which their duties to the company and their personal interests may conflict.

The minutes of the 34th board meeting show that the first, second, third and fifth respondents attended the meeting but only the first and fifth respondents declared their interest in SCB. Article 84 of the articles of association of Nova provides a director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest in accordance with the provisions of the Act. That article also provide he shall not vote in respect of any contract or arrangement which he is interested and if he shall do so his vote shall not be counted.

Section 131 of the Act, inter alia, provides:

> (1) Subject to this section every director of a company who is any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.

The minutes of the 34th board meeting do not at all show who voted and who abstained from voting. The minutes merely state: 'In conclusion the Board of Directors agreed to rent the said land to Syarikat Common Brick Sdn Bhd ... '. The question of whether that resolution is void as it contravenes art 84 of the articles of association of Nova or s 131 of the Act is not a question which is before this court. As such I cannot see the bearing of this area of complaint raised by the petitioners. The board has agreed to rent that part of Lot 893 to SCB and that being the case, I cannot see how the passing of that resolution can be said to constitute oppression for the purpose of s 181(1) of the Act. The issue of SCB being a competitor is, to me, a non-issue. Be that as it may, the evidence show the type of bricks being manufactured by SCB were different from that being manufactured by Nova, viz, SCB produce bake-free bricks whereas Nova produce baked-bricks or fire-bricks. The respondents have explained the manufacturing of bake-free bricks is a green productivity industry and it is their stand that the end product is different from traditional baked-bricks or fire-bricks or clay bricks. It is non-labour intensive and is made from top-soil with sand whereas baked-bricks or fire-bricks or clay bricks requires clay without sand, is labour intensive and requires the use of ovens or urns for baking and rubber wood to control the fire temperature.

The petitioners have also complained that as a result of the presence of SCB within the vicinity, Nova's business have been affected. In his evidence SP3 insisted that Nova made a loss in 1995 not only due to the floods and the high salaries paid to directors. It was also due to the existence of SCB in the same location and servicing the same market. Furthermore, he insisted, SCB was also producing bricks and in big quantities at that with not much variance in price. On this issue, it is the respondents' stand that even the business of SCB has been affected during the same period and that this was caused more by the downturn in the economy rather than competition or high directors' remuneration. Even SP2 agree that the main reason why Nova made a loss of between RM100,000 to RM200,000 in 1995 was due to the floods which affected Nova's factory. SP2 has also admitted that Nova manufacture baked-bricks or fire-bricks whereas SCB manufactured non-baked bricks which at that material time was considered to be a new product in Malaysia.

(3) Increase in remuneration to directors

On this area, it is the petitioners' case that Nova has been making losses although its maintenance costs have gone down but yet directors' remuneration, bonus and allowances have increased. The evidence showed

Nova made profits in the years 1991–1995 but suffered losses in the years 1996–1997. In 1996 it made a loss of RM109,249 and in 1997, a loss of RM239,410. The petitioners complain despite that situation, directors' salaries, bonus and allowances have increased from 8.2% in 1991 to 23.5% in 1997. Further, for the years 1995–1996 the maintenance costs were high but for the years 1996–1997, maintenance costs have decreased but salaries have increased. On remuneration paid to directors, the petitioners pointed out the following:

(a) In 1996 the first respondent was drawing a monthly salary of RM3,800 and received a two month bonus amounting to RM7,600 and an annual allowance RM7,600. In 1997 he was drawing a monthly salary of RM4,000 but did not receive any bonus or allowance. From January 1998 to June 1998 he was drawing a salary of RM4,000 per month but in July 1998 it was reduced to RM3,000. However he was not given any bonus or allowance for 1998.

(b) In 1996 the third respondent was drawing a monthly salary of RM1,100 and received a two month bonus amounting to RM2,200 and an annual allowance of RM2,200. In 1997 he was drawing a monthly salary of RM1,200 but was not paid any bonus or allowance. Between January to July 1998 he was drawing a monthly salary of RM1,020.

(c) In 1996 the fourth respondent was drawing a monthly salary of RM300 and received a two month bonus amounting to RM600 and an annual allowance of RM600. In 1997 he was drawing a monthly salary of RM400 but was not paid any bonus or allowance. Between January to June 1998 he received a monthly salary of RM400 but in July 1998 it was reduced to RM360.

(d) In 1996 the fifth respondent was drawing a monthly salary of RM2,400 and received a two month bonus amounting to RM4,800 and an annual allowance of RM4,800. In 1997 he was drawing a monthly salary of RM2,700 but was not paid any bonus or allowance. Between January to June 1998 he received a monthly salary of RM2,700 but in July 1998 it was reduced to RM2,025.

The above details came from the evidence of SP3 who was previously employed by Nova as an accounts clerk and had worked with Nova for about 20 years. He stated he resigned from that post in August 1998 when he reached the age of 60. Under cross-examination, SP3 admitted he was also drawing a monthly salary from Nova and that he also received a director's fee which was given to him on an annual basis. He admitted that his salary was lower than that received by the first and fifth respondents but higher than what were received by the third and fourth respondents. He further admitted receiving a two month bonus and an annual allowance for the year 1996. He agreed he never objected to the salary, bonus and allowance being paid to him. Be that as it may, he alleged that it was the first respondent who approved these payments besides the other forms of payment, eg, travelling allowances and car maintenance.

A In relation to this complaint, the first respondent insists it is the board of Nova at the outset that approved payments for director's remuneration, lodging allowances and bonus. Later such payments were based on seniority of directors who put forth their claims and this was approved by the board.

From my perception of the facts of this case, I think the source of this B area of complaint stem from the way Nova is being run by those who sit on the board. Article 76 of Nova's articles of association which deals with remuneration of directors read:

> The remuneration of the directors shall from time to time be determined by the company in general meeting. The directors shall also be paid such C travelling, hotel and other expenses as may reasonably be incurred by them in the execution of their duties, including any such expenses incurred in connection with their attendance at meetings of directors. If by arrangement with the other directors any director shall perform or render any special duties or services outside his ordinary duties as a director, the directors may pay him special remuneration, in addition to his ordinary remuneration, and such D special remuneration may be by way of salary, commission, participation in profits otherwise or as may be arranged.

In relation to remuneration of directors, Lindley LJ has this to say in *Re George Newman & Co* [1895] 1 Ch 674 at p 686:

> E Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of company's assets, unless authorised so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets F properly divisible amongst the shareholders themselves.

At the same page the learned judge said:

> Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not G equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded.

The evidence seems to suggest that Nova has sanctioned the payment of H salaries, directors' fees, bonus and allowances. Article 76 of Nova's articles of association clearly allows remuneration to be paid. In his evidence even SP2 stated that directors of the minority shareholders are also paid directors' fee and 'commission fee' in accordance with their shareholding. That being the practice in Nova, I do not think it is the function of the court hearing this petition to enquire as to whether such payments were improper I or whether they were too excessive under the circumstances. Unless there is evidence to show that these payments have not been sanctioned by Nova, it is a non-issue as far as these proceedings are concerned.

(4) Utilization of Nova's funds by the first respondent:

It is the petitioners' case that the first respondent has utilized Nova's funds for his own benefit on three occasions, namely:

(a) on 29 August 1995, he approved payment for the sum of RM5,000 for refurbishing the cushion of motor-car bearing Registration No WDK6633 which belong to the third respondent;

(b) in 1996, he went on a trip to South Africa on Nova's expenses as evidenced by a payment voucher dated 22 March 1996 paid to a travel agency costing RM4,958 which he himself approved for payment;

(c) in 1997, he went on a trip to China on Nova's expenses costing RM1,908; he himself approved the payment.

In relation to the expenditure incurred by Nova to refurbish the said motor-car, the evidence show that the third respondent, who besides being a director of Nova, is employed by Nova as sales executive. He has to use the said motor-car to carry out his work as he has not been provided with a company motor-car. In his evidence, the third respondent explained he has never been provided with a company motor-car although he has been requesting for one since 1987. As sales executive he has to meet clients and need at least a presentable car and since he was utilizing his own motor-car for carrying out his work, Nova agreed to pay for the said refurbishment.

In relation to the trips to South Africa and China, the first respondent state he was the managing director of Nova for 22 years and these were the only trips he made as managing director. He also furnished evidence to show that Nova had also rewarded other employees with similar trips to different destinations.

In relation to this area of complaint, I would adopt the same views I expressed above in para 3. Unless there is evidence to show that the above expenditure was unlawful or has not been sanctioned by Nova, I do not think it is the function of the court to enquire into such matters.

In *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520 which relates to an action brought under s 181(1) of the Act, Siti Norma Yaakob J (as she then was) said (at pp 535–536):

> The scope of s 181(1)(a) and (b) was discussed by the Privy Council in the case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 ...
>
> Dealing with s 181(a) specifically, the Privy Council then proceeded to lay down the following guidelines as to how a complainant can invoke that subsection:
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> > 'The complainant must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess the majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the complainant does not agree, is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked.'

> Thus to establish a case under s 181(1)(a), the petitioner must show that the affairs of the company are being conducted or that the powers of the fourth to eleventh respondents as directors of the company are being exercised in a manner oppressive to or in disregard of the petitioner's interests as a shareholder of the company ...
>
> As it is quite impossible to lay down categories of conduct considered to be oppressive, each case has to be examined in the light of its own particular facts and thus the particular types of conduct complained of in the cases cited merely tend to illustrate whether such conduct can be regarded in law to be oppressive. From those cases, it is sufficient for me to conclude that oppression does not necessarily mean illegal or fraudulent nor does it require fraud. For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play and where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor. Similarly, 'disregard involves something more than a failure to take account of the minority's interest: there must be awarenesss of that interest and an evident decision to overide it or brush it aside or set at naught the proper company procedure', per Lord Wilberforce in *Re Kong Thai Sawmill.*

From the evidence adduced at the trial, I find that there was no deliberate concealment on the part of the first to the fifth respondents of their interest in SCB. In fact SCB through the respondents offered to rent that part of Lot 893 which had remained unused and untenanted for 16 years. It was not even suitable for use without land-filling which was carried out by SCB at its own expense. In relation to the complaint about payment of remuneration, bonus and other allowances, this practice was there at the outset. SP3, a director of Nova, who condemned such payments in his evidence was himself formerly a recipient of those benefits when he was an accounts clerk with Nova. He willingly accepted such remuneration then and as such I cannot fathom why he is complaining that such payments tantamount to oppressive conduct.

On the whole, what is clear, to me, is that the petitioners acquiesced in Nova's decision to rent that part of Lot 893 to SCB at RM500 per month for the first three years. They were also aware of the first to the fifth respondents interest in SCB at the outset. If at all they were aggrieved that the rental was too low or below market value and that the first to the fifth respondents had bull-dozed through to get the tenancy agreement executed at a low rent as suggested, why did they file their petition only in 1997? Why the delay if that was really the main oppressive act?

The petitioners have also failed to prove that the first to the fifth respondents have acted in disregard to their interest or that the affairs of Nova have been conducted in a manner oppressive to the petitioners. To me, the oppression that the petitioners are complaining about seem to relate more towards the first to the fifth respondents rather than towards the affairs of Nova itself. As stated earlier, what needs to be determined by the court is whether the petitioners have brought themselves within the scope of s 181(1)(a) of the Act. On the whole I am of the view that the circumstances and matters complained of by the petitioners do not at all denote that there was oppression within the meaning of s 181(1)(a) of the Act. There is nothing to show that Nova's actions complained of were

designed to injure the petitioners in their rights as members. I cannot find anything to suggest that Nova is not being conducted efficiently by the existing board of directors in the interests of the members, and neither do I find any violation of the conditions of fair play or abuse of power being committed by the directors which could amount to oppression.

Since the petitioners have failed to show that it is the affairs of Nova itself which are conducted in an oppressive manner and that Nova has oppressed the petitioners and other minority shareholders, I see no reason why Nova should be wound up and thus I would dismiss this petition with costs.

Petition dismissed.

Reported by Jafisah Jaafar